UNITED MERCHANT FINANCE BHD

v.

CHANG MIAU SIN

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-1674-1999]
23 OCTOBER 2000

BANKING: *Banker and customer - Interest rate for loan - Variation of - Interest rate for loan increased without notice in writing to chargor - Whether advertisement in newspaper by chargee constituted notice in writing - Charge documents executed before chargee's solicitor and not before chargor's solicitors - Order for sale - Whether "cause to the contrary" established*

LAND LAW: *Charge - Order for sale - Whether "cause to the contrary" established - Interest rate for loan increased without notice in writing to chargor - Whether advertisement in newspaper by chargee constituted notice in writing - Charge documents executed before chargee's solicitor and not before chargor's solicitors*

BANKING: *Securities for advances - Charge - Order for sale - Whether "cause to the contrary" established - Interest rate for loan increased without notice in writing to chargor - Whether advertisement in newspaper by chargee constituted notice in writing - Charge documents executed before chargee's solicitor and not before chargor's solicitors*

The defendant charged his property to the plaintiff for a fixed loan of RM130,000. Upon the defendant's failure to satisfy the terms and conditions of the loan, the plaintiff applied for an order for sale of the said property.

The loan agreement contained a term which allowed the chargee, by notice in writing to the chargor, to vary the rate of interest. The plaintiff had increased the rate of interest, but the defendant averred that he had not been served with a notice in writing. The plaintiff submitted that it had advertised the increased rate of interest in "The Star" newspaper which, it argued, constituted notice in writing.

The plaintiff further submitted, relying on the Court of Appeal's decision in *Foo Yoke Foon v. Public Bank Bhd*, where no notice was served, that the execution of the charge documents by the appellant there in the presence of his own solicitors rendered the variation of interest a bilateral act.

Held:

[1] The plaintiff did not even exhibit the said advertisement in its affidavit, and even if it had done so, the question remained whether the advertisement constituted "notice in writing" within the meaning of the loan agreement. In these circumstances, no notice in writing was given to the defendant.

[2] The plaintiff confirmed that the charge documents were executed by the defendant before the plaintiff's solicitors, and not before the defendant's solicitors. Therefore, the decision in *Foo Yoke Foon v. Public Bank Bhd* could be distinguished on the facts.

[Plaintiff's claim dismissed with costs.]

Case(s) referred to:
Foo Yoke Foon v. Public Bank Bhd [2000] 3 CLJ 405 ***(dist)***

For the plaintiff - Jenny Toh; M/s Kington & Tan
For the defendant - SK Charanjit Singh; M/s SK Charanjit Seran & Co

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

This is the plaintiff's application for sale by public auction the property of the defendant charged to the plaintiff in respect of a fixed loan of RM130,000 granted by the plaintiff to the defendant at the latter's request. On the defendant's failure to satisfy the terms and conditions of the loan the plaintiff moved this court for an order for sale.

Findings Of The Court

It is a term of the loan (cl. 7) that the "chargee may from time to time by a notice in writing of its intention so to do increase or reduce the Ruling Rate of interest payable". The Base Lending Rate (BLR) at that time was 10.65% and the interest charged was 0.5% above the BLR, thus making the Ruling Rate of interest at 11.15%. The defendant pointed out that the notice of demand dated 3 March 1998 and addressed to the defendant stated that the plaintiff was claiming interest at "0.5% above the Base Lending Rate (currently at 13.2%) per annum". The defendant further pointed out that he was never served with a notice in writing of the plaintiff's intention to increase the rate of interest. Whilst the defendant has specifically raised this issue in his

affidavit, the plaintiff replied in its affidavit that it had advertised the increased rate of interest in "The Star" newspaper. If indeed the plaintiff had done so, the question still arises whether advertisement in the newspapers constitutes "notice in writing" within the meaning of cl. 7 of the loan agreement (the annexure to the charge). In any case, if the plaintiff had indeed advertised in "The Star", then the least the plaintiff could have done was to have exhibited in its affidavit the advertisement in "The Star". Even this was not done. In the circumstances, I was constrained to accept the defendant's submission that no notice in writing was given to him of the increase in the rate of interest.

However, the plaintiff referred me to a recent Court of Appeal decision in *Foo Yoke Foon @ Foo Chee Yeen v. Public Bank Berhad* [2000] 3 CLJ 405, where on similar facts the court held that notwithstanding the fact that the interest claimed by the bank was in excess of the rate stipulated in the letter of offer and no notice was served of the variation of the interest rate, the fact that the appellant had executed the charge documents in the presence of his own solicitors, meant that he could not be heard to say that the variation of the interest was a unilateral act. The Court of Appeal in *Foo Yoke Foon* made it very clear that "on the facts" it was not prepared to hold that the appellant had established sufficient "cause to the contrary". In the case before me, counsel for the plaintiff, to a specific question from the court, confirmed that the charge documents were executed by the defendant before the bank's solicitors. In the circumstances, I held that the decision in *Foo Yoke Foon* would not apply to this case. I therefore dismissed the plaintiff's claim with costs.